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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 497

149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,
Petitioners,

against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH MCARDLE, SAMUEL MANNE, CORNELIUS MCCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,
Respondents.

PETITIONERS' REPLY BRIEF

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of Counsel.

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149 MADISON AVENUE CORP. and WILLIAMS & CO., INC.,

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against

FRANK ASSELTA, CAMILO DEL RIO, JOSEPH McARDLE, SAMUEL MANNE, CORNELIUS McCOLE, BURTON PETERSON, FRANK RODRIGUEZ, JAMES TORRA, JOHN H. BERGER and GEORGE BERGER,

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PETITIONERS' REPLY BRIEF

The brief on behalf of the Administrator of the Wage and Hour Division, as *amicus curiae*, filed belatedly, raises two false issues. First, the claim that this case involves what the Administrator calls an "X-formula" (see pp. 11 to 14 inclusive of his brief) where the formula or contract hourly rate varies with the number of hours worked, displays an amazing lack of candor regarding the stipulated facts of record and the findings of the District Court. Second, the Administrator's constant endeavor to draw a distinction between the statement of an hourly rate and a formula for calculating the hourly rate where all factors are known in advance and stated in the contract, ignores the rules of simple arithmetic.

On one issue only—which we accept as the only true issue before this Court—does the Administrator come

to grips with the facts of this case: Were the contract hourly rates computed under the terms of the National War Labor Board Agreement the real rates by which respondents' compensation was determined? As stated in the very first sentence of his Summary of Argument: "The validity of the compensation plan in the instant case depends upon the genuineness of the hourly rates employed by petitioners."

I

Answering Administrator's Point I—The contract formula for computing hourly rates is not artificial.

A. The claim that the formula was a so-called "X-formula" producing a varying hourly rate dependent upon hours worked is an inexcusable misstatement—later contradicted in the Administrator's own brief and repudiated by Respondents.

At page 12 of his brief, the Administrator says: "Although the X-formula in the contract here provides a means for determining hourly rates, we believe that rates determined in this manner are not genuine rates, particularly *where the divisor of the weekly wage is stated to depend upon the hours actually worked* * * *. The rates derived from use of the formula have no independent significance in determining the employees' compensation *because they fluctuate from week to week and are not known until the number of hours actually worked are known*" (italics ours).

Two pages later, the Administrator contradicts himself (see pp. 14 to 15): "Instead of dividing the weekly wage by the number of hours employed plus one-half the number of hours *actually* employed in excess of 40 hours, petitioners divided by the *scheduled* number of hours plus one-half the *scheduled* hours in excess of 40, namely, by 61 in the case of watchmen and 49 in the case of other

employees * * *. Without considering the effect of employing hourly rates calculated in a manner not provided in the contract, it may be conceded that computation of the hourly rates in this method somewhat lessens their artificiality *since they are known in advance once they have been computed.* * * * *The use of 61 or 49 as the divisor* of the agreed weekly wage rather than the actual number of hours for which it was paid at once suggests a fictitious mode of calculation'"* (latter italics ours).

Obviously the Administrator has jumped on his white steed and dashed recklessly off in opposite directions! The reason for this strained effort will be apparent later.

In partial mitigation of his offense, the Administrator would probably plead that he was confused by the District Court's reading of the literal language of the formula as calling for a variable hourly rate. (see footnote 5 of Petitioners' Brief, pp. 15-16). But the District Court found (R. 173, 198) that:

> "In fact they (the contract rates) did not so vary, but remained the same from week to week as if the plaintiff (sic) actually worked only the regular workweek."

However the District Court or the Administrator may have read the formula, they were not free to disregard the

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* The use of such fixed divisors suggests nothing of the kind. Where by agreement the weekly wage for a fixed workweek includes overtime at 150% of the contract hourly rate, as here, the only possible divisors are those used in the N. W. L. B. Agreement since the divisors exactly state in equivalent hours of compensation the amount of the agreed weekly earnings. As stated throughout Petitioners' brief, and as must be obvious, the formula in the setting of this agreement is simply an algebraic restatement of the Act's overtime requirements. See also for a more extended demonstration of this fact, Brief for Midtown Realty Owners' Association, Amicus Curiae, pages 18 to 20, and Brief for 128 West 30th Street Corp. et al., Amici Curiae, pages 20 to 26.

stipulated facts and the actual interpretation of the N. W. L. B. Agreement as evidenced by the payrolls and the War Labor Board's explanation of how the formula operated.

It was stipulated that respondents "were employed and paid in accordance with the terms and conditions of employment provided in a collective bargaining agreement known as the National War Labor Board Agreement" (Pl. Ex. 2, R. 120-121).

The payrolls show that respondents were paid on the basis of fixed hourly rates (Pl. Ex. 6, pp. 36-103).

The War Labor Board's explanation of the formula shows the same thing (see example at bottom of p. 70 and top of p. 71, Pl. Ex. 4).

The real reason for this false excursion by the Administrator appears at pages 18 and 19 of his brief in the *Halliburton* case, Docket No. 74 filed with this Court in September 1946 before the instant petition in Docket No. 497 had been granted. Relying on certain loose language of the Circuit Court below in our case which also ignores the facts of record and the finding of the District Court, the *Asselta* case is grouped with other circuit court decisions as illustrative of the "X-formula." In his long and patient effort to reverse this Court's decision in the *Belo* case, the Administrator found comfort in decisions of various circuit courts condemning the "X-formula." The language of the Second Circuit Court in our case seemed particularly appropriate for that effort. Faced with Supreme Court review of the *Asselta* case and exposure of error in his ill chosen prop, the Administrator's brief has sacrificed candor for consistency.

Respondents' brief (p. 6) tacitly concedes the obvious fact that the formula produced fixed hourly rates. But respondents go astray as did the District Court, in refus-

ing to believe that it is ever legally possible under any circumstances to derive an hourly rate from an agreed weekly wage for specified hours, inclusive of overtime.

B. The constant assumption that this was not an express hourly rate contract or its equivalent, ignores the teachings of simple arithmetic.

At page 8 of his brief, the Administrator says: "The failure to agree upon specific hourly rates and the artificial manner of their computation strongly indicate that the formula hourly rates were fictitious."

We have already dealt with the claim that the formula method of computing rates in this case is artificial. The constant assumption that there was "failure to agree upon specific hourly rates" (see, Administrator's brief, pp. 8, 10 and 11) is wholly inconsistent with the grudging admission (p. 15) "that computation of the hourly rates in this method somewhat lessens their artificiality since they are known in advance once they have been computed".

We had not thought it necessary in this case to demonstrate at length that a contract which specifies that the hourly rate shall be computed by dividing an agreed weekly wage of $49.00 inclusive of overtime by 49 is the same as a contract stating the hourly rate to be $1.00 per hour.

The Administrator's brief does not spell out the reasons for his stubborn assumption on this point except by reference (p. 11) to his brief as petitioner in *Walling v. The General Industries*, Docket No. 564. Examination of the latter brief discloses (pp. 12 to 17) that the Circuit Court cases there relied on refused to spell out an hourly rate solely from an agreement, express or implied, that the stated salary included overtime. The reason is plainly

stated at page 14: "Obviously it is not the function of the courts to allocate this or the other salary increases * * * to regular time and overtime. *Walling* v. *Harnischfeger* Corp., 325 U. S. 427. As stated in the concurring opinion of Mr. Justice Frankfurter: 'It should not be left to courts to work out a hypothetical mathematical interpretation which, if it corresponded with the actual arrangement, could satisfy the statute.' "

In our case, nothing has been left to the courts either by way of implying an agreement to include overtime in the weekly wage for the fixed regular workweek or by way of allocation. As we stated in our main brief (p. 22) "Allocation of non-overtime earnings and overtime is precisely the function of the formula. In the formula the hourly rate necessarily reflects all non-overtime payments for the regular workweek."

The Circuit Court below after observing that "the parties did not see fit to agree upon the basis of a designated regular hourly rate of pay for a statutory workweek *expressed simply in terms of dollars and cents*"* (italics ours), seems to concede there is really no difference in fact or law between a stated rate and a derivative rate (R. pp. 82-83).

Finally, it does seem rather absurd for the Administrator to deny the existence of specific hourly rates in the face of the payrolls (Pl. Ex. 6, pp. 36-103).

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* The remainder of the Circuit Court's suggestion at this point that the parties retained "the previous weekly wage" is, of course, contrary to the facts. See Tables 1 and 2 of Brief for 128 West 36th Street Corp., et al., *Amici Curiae*, pp. 31, 32; see also Appendix A of Petitioners' Brief.

II

Answering Administrator's Point II—The contract hourly rates were operative rates and not artificial. Certain minor features of the agreement emphasized by the Administrator do not establish the contrary.

The Administrator endeavors to prove generally that the real rates were the agreed weekly wages, not the contract hourly rates as computed under the formula. It is argued that under certain circumstances when respondents worked fewer hours or more hours than their regular workweek, the amounts paid them "directly reflected" the agreed weekly wage. It is further argued that "in workweeks of scheduled hours the weekly wage was always paid even though the application of the formula rates frequently equalled a slightly different amount" (p. 16).

Much of the Administrator's argument on this score is answered in petitioners' main brief. Our reply is limited to new points not heretofore advanced by respondents in the courts below or to new emphasis on old matters.

(a) *Deductions for absences.*

The Administrator's surprising argument that petitioners paid respondents too much money (i. e. more than the contract hourly rates) when they were ill or otherwise excusably absent, has been answered in our main brief (pp. 29-31). We merely point out that the amounts paid in the short workweeks do not "directly reflect" any weekly wage or an average hourly rate (i. e. inclusive of overtime). The Administrator's own tabulation (footnote 12,

pp. 20-21) shows that the amounts paid exceeded the proportionate share of the weekly earnings.*

(b) *Premium Rates (175% of contract rate) for hours beyond scheduled workweek or workday.*

Here again the Administrator seeks to penalize the employer for paying a premium for certain overtime hours in excess of the 150% rate required by Section 7(a) of the Act. Here again is the same failure to recognize that these special premiums relate to unusual and abnormal situations where the employee works more than 9½ hours per day or 46 hours per week. (Watchmen were paid 200% of the contract rate or double time for hours beyond 11½ per day, or 54 per week.)

The asserted equivalence between overtime at 175% of the contract rate for hours beyond the regular workweek and overtime at the statutory rate of 150% on the agreed weekly wage, as proof that the weekly wage was the real rate, fails because there is no equivalence. For example, taking an employee whose contract rate is $.561 per hour, his earnings for a 54 hour workweek (8 hours beyond the regularly scheduled workweek) would be 40 x .561 = $22.44 *plus* 6 x .843= $5.06 *plus* 8 x .98 = $7.84 or a total of $35.34. If the employer intended to pay statutory overtime only on hours beyond the scheduled workweek, he has failed since on that basis he would have paid $27.50 (for 46 hours) *plus* 8 x .895 = $7.16 or a total of $34.66.

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* Administrator's citation of *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, as condemning payment of overtime compensation for non-overtime hours, is most inapposite. Here excusable absences are treated as time worked so the employee won't lose the benefit of overtime where not at fault. There overtime was paid regularly within the normal workday as part of a scheme to maintain the old wage scales.

(c) *The unused provision for "per diem" rates.*

The Administrator points to a general clause in the contract (Pltf's. Ex. 1, p. 32) providing a method for calculating "per diem" rates as being inconsistent with the contract rates computed under the formula. If this clause had ever been used at all, especially in the case of employees whose hourly rates were computed under the formula, the Administrator might have an argument. But there is no evidence that it was ever applied or intended to be applied. This was a general clause carried over blindly from the prior Sloan Agreement (Pltf's. Ex. 3, p. 15) without consideration of its irrelevance under the terms of the N. W. L. B. Agreement.

This strained argument again indicates the Administrator's determination to reach a particular result regardless of fact.

(d) *Contract rates for part time employees.*

The fact that Bilbow (who was not even a plaintiff in the action but whose wages are shown on the payrolls in evidence) received an hourly rate of $.51 per hour while acting as a relief watchman—virtually the equivalent of the *average* hourly rate, inclusive of overtime, paid McCole, the regular watchman for his regular workweek—does not prove that McCole's contract rate of $.45 per hour was artificial. The equivalence resulted from the fact that McCole regularly worked overtime. It does not appear that he ever worked less than his regularly scheduled workweek of 54 hours. Had he done so, he would have been paid, as stipulated (R. p. 143), on the basis of his $.45 rate for the first 40 hours worked and 150% that rate for excess hours unless his absence was excusable. Thus, if McCole had worked only 42 hours he would have been paid 40 x $.45 = $18.00 plus 2 x $.675 = $1.35, or a total of $19.35. His average rate for that week would then be $.46.

As a matter of collective bargaining the parties quite rationally established a higher hourly rate for employees who had no opportunity to earn overtime pay despite their different practice before the application of the Act made consideration of overtime a relevant factor in the adjustment of rates between men in the same occupations.

It is difficult to comprehend how it demonstrates that the hourly rate of a regular employee was not his real rate of pay.

(e) *Admittedly "slight" payroll discrepancies during regular workweeks.*

Both the Administrator's brief and Respondents' brief refer to payrolls where the extension of the stated hourly rate for 40 hours and of the stated overtime rate for the 6 overtime hours, result in a deficiency of 4 cents. Since the agreed weekly wage was then always paid for the regular workweek, it is argued that the rate had no function or vitality.

The payroll for the week ending November 20, 1943 (Pl. Ex. 6, p. 100) is an example. There respondent Manne's hourly rate is stated as $.589 and his overtime rate as $.884. Earnings for the first 40 hours are stated as $23.59, whereas 40 x $.589 = $23.56. Overtime for the last 6 hours are stated as $5.31, whereas 6 x $.884 = $5.30. The discrepancy is only apparent, not real. For had the bookkeeper carried the regular rate to four decimals it would be $.5897 per hour and for 40 hours would be $23.59. By the same token, the overtime rate would be $.885 and and for 6 hours would be $5.31.

The payrolls after the week ending October 16, 1943 when a wage increase was first made effective (Pl. Ex. 6, p. 94) reveal an obvious error in the case of McCole.

His stated hourly rate is $.48 per hour, his overtime rate $.69 per hour. That it was an error by the payroll clerk appears from the fact that this obvious understatement of the overtime rate continues for a number of weeks thereafter.

The misstatement of the contract rates in workweeks when respondents worked their regularly scheduled hours are of little consequence if the employees received their agreed weekly earnings, which it is stipulated they did. Indeed, the application of the *de minimis* principle seems entirely appropriate in the situation. It is a trifling matter when the larger interests implicit in this collective bargaining agreement are considered.

If we are correct in our argument that it is consistent with the Act to agree upon weekly earnings inclusive of overtime subject to allocation thereof by formula into regular and overtime rates, the relevant test is the application of the contract rates where hours are worked less than or beyond the scheduled workweek. The contract rates were then applied, not proportionate weekly rates. The fact that more than the proportionate weekly rates was paid in certain special situations heretofore discussed does not establish the weekly earnings for the scheduled workweek as the real rates or destroy the vitality of the contract rates.

(f) *The retroactive wage payments.*

The increase of $1.40 per week for the regular workweek granted in October 1943 retroactive to April 21, 1943, included both straight time and overtime pay, as the Administrator correctly states. While the payroll (Pl. Ex. 6, p. 97) shows an effort by petitioners to make an appropriate adjustment for employees who worked beyond the scheduled workweek during the retroactive period,

it is apparent that adjustments were not made on the basis of the new hourly rate where fewer hours than the scheduled week had been worked. If the contract hourly rates controlled compensation during this period in fact, the payment of a retroactive increase including overtime, even though overtime was not worked, should not be permitted to destroy the fact of interim compliance. Again the vice, according to the Administrator, is that some people received too much money. Picayune adjustments by employers in such a situation might easily breed disputes and grievances. "In light of the realities of the industrial world", petitioners here should not be penalized for using common sense.

III

Answering certain points in respondents' brief.

Both respondents and the Administrator seem to proceed on the erroneous theory that between April 20, 1942 and September 1, 1943 when the N. W. L. B. Agreement was signed, the *status quo* under the prior Sloan Agreement was maintained and that overtime liability under the Act accumulated each week which no new agreement could satisfy except by full payment of the overtime liability plus liquidated damages of equal amount. This overlooks the fact that the Sloan Agreement had expired and the Union on behalf of respondents and its members had agreed that the new wages and hourly rates would be retroactive to April 21, 1942 (R. 133-134). No liability for overtime could fairly accrue until the wages were known and agreed upon by the parties. Interim payments were only tentative payments on account. When the retroactive payment of a sum equivalent to $2.50 per week was made it was paid and accepted on the understanding that it included compensation for overtime on the basis of the newly

agreed rates. Undoubtedly some employees who worked no overtime in certain weeks were overpaid; others who worked beyond the scheduled workweek of 47 hours then prevailing may not have been paid enough. Again these circumstances should not invalidate the payments to those who received their full amount. At best those underpaid, if any, might have some small claim.

Respondents say that sanctioning the retroactive operation of the N. W. L. B. Agreement would fail "to fulfill the purpose of the Act to limit the number of overtime hours demanded by employers who were not—contemporaneously—bound to pay time and one half for overtime" (p. 16). This misconceives the effect of Section 7(a). The Act does not limit overtime hours. It makes them more costly than non-overtime hours. Moreover, the employers were contemporaneously bound to observe the Act by its own force. There was no contract and no agreed wages. Once terms were agreed upon, the employers, including petitioners, were liable on the basis of the new wage scales for whatever overtime had been worked.

As demonstrated by Appendix A attached to petitioners' brief, the N. W. L. B. Agreement resulted in hourly rate increases for all members of Local 32-B as contrasted with their hourly rates under the prior Sloan Agreement (except as to McCole, the watchman, for a limited period up to August 10, 1942). J. H. Berger and Rodriquez were not members of Local 32-B and not subject to the requirement of that agreement that the hourly rate would not be lowered. Actually in Berger's case, his hourly rate increased substantially after September 14, 1942.

Hence, the table at page 11 of respondents' brief and the conclusions drawn from it are without real foundation. The suggestion that the War Labor Board did not understand the effect of its directive as to wages and hours does real injustice to the caliber of the men on the Panel

and the Board.* It is clear that in fixing wages for loft buildings they were adopting the wage scales and the formula for computing hourly rates then in force in the Garment Center (Pl. Ex. 4, pp. 27, 33-34, 70-71). They understood that because of the prospective application of the Fair Labor Standards Act, "take home" pay had to be integrated with agreed hourly rates and that it was the function of the formula to specify the rates. They understood that the hourly rates ordered by them were necessarily lower than they would have been if wage scales had been fixed solely in terms of a weekly wage which would have defeated their purpose of harmony with the Meyer Agreement.

The employees received substantial increases in "take home" pay by virtue of the N. W. L. B. Agreement. It is pure speculation to suggest they would have rejected their own Union's agreement if hourly rates had been expressly set forth in the document itself. The increases actually gave them more than the Act would have required on the basis of the Sloan Agreement wages. In any event they could not have been misled because it was not judicially determined until several years later that the Sloan Agreement wages were inadequate under the Act. *Adams* v. *Union Dime Savings Bank*, 144 F. 2d 290, cert. den. 323 U. S. 751 (1944).

Finally, whatever the propriety of respondents' reference to the Frankenthaler Agreement (p. 17), it is clear that the Union has now achieved the 40 hour week which the Act did not require as an absolute standard but set

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* The comparison by the Panel between hourly rates in Class "C" lofts and Class "A" apartments where the average hourly rate of $.59 is used instead of the formula rate of $.561 reveals no misunderstanding or "real feeling" about the formula. The use of the average rate in this case was the only true method of comparison since apartments were not subject to the Act and did not pay overtime after 40 hours per week.

as a goal gradually to be achieved under the compulsion of punitive overtime. The National War Labor Board Agreement was a step in the process of this evolution. There is no reason for believing that this Court's seal of approval on that agreement to which the Union pledged its faithful adherence, would or could turn back the clock.

Respectfully submitted,

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